

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1110

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

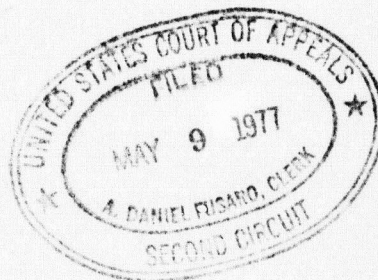
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DOCKET NO. 77-1110

UNITED STATES OF AMERICA,
APPELLEE,
-VS-
JOHN MARK WEBB,
APPELLANT.

On Appeal From The United States District Court
For The District Of Connecticut

BRIEF FOR APPELLANT



ANDREW B. BOWMAN
FEDERAL PUBLIC DEFENDER
770 CHAPEL STREET
NEW HAVEN, CONNECTICUT 06510
(FTS) 8-643-8148
ATTORNEY FOR APPELLANT

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QUESTIONS PRESENTED

- I. Did the trial judge err in refusing to strike the government's psychiatric testimony after the witness admitted that he could not understand and apply this Court's insanity test?
- II. Was the government's evidence of mental responsibility insufficient?

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APPELLEE,
-vs-
JOHN MARK WEBB,
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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is a direct appeal from a judgment of conviction and sentence of twelve years' imprisonment entered on February 28, 1977, in the United States District Court, New Haven, Connecticut, before the Honorable Robert C. Zampano.

On October 26, 1976, a grand jury in Hartford returned a three-count indictment charging John M. Webb with violation

of the federal bank robbery statute, 18 U.S.C. §2113(a),(b),(d). On January 18, 1977, a jury of twelve and two alternates was selected and sworn, and on January 25, the presentation of evidence began. On January 28, the jury returned verdicts of guilty on counts one and two and not guilty on count three. John Webb's motions for judgment of acquittal at the close of the government's evidence, at the close of all the evidence, and after the verdict were all denied by Judge Zampano.

On February 28, 1977, Judge Zampano imposed a sentence of twelve years' imprisonment as a general sentence. On the same date a notice of appeal was filed. John Webb is incarcerated at the Federal Prison Hospital, Springfield, Missouri.

STATEMENT OF FACTS

On October 13, 1976, John M. Webb, a severely disturbed twenty-five year old man who suffered from chronic undifferentiated schizophrenia, entered a branch of the Union Trust Company located at 700 Connecticut Avenue, Norwalk, Connecticut. He carried a pellet gun and wore sunglasses and a large, bizarre "Afro" wig. Teller Doris Gough described Webb as "soft-spoken" and wearing "a rather strange outfit." Tr. 33. He took \$6,299 from the bank.

Since the sole contested issue in the trial was the mental responsibility of John Webb at the time of the commission of

the offense, the following medical reports, expert and lay testimony were presented to the jury.

Medical Reports

Defendant's exhibit A consisted of hospital reports and medical records of three admissions to Stamford Hospital for psychiatric treatment in January, 1973, August, 1975, and March, 1976. In January, 1973, according to the discharge summary of Peter Schneidau, M.D., John Webb "had progressive feelings of emptiness, apathy and finally an inability to function." Shortly before admission he had contemplated suicide and had taken an overdose of Librium. His affect was "quite flat" and was at times "inappropriate." His hospital stay lasted 25 days, and upon release he was diagnosed as having suffered a "schizophrenic reaction." The prognosis "for the immediate future was fair but guarded for the longer term." App. 19.

Two and a half years later, at age 24, he was again admitted to the psychiatric ward at Stamford Hospital where Arthur Mode, M.D., treated him and wrote the following report. App. 20-21:

At the time of admission, he was preoccupied with sex, was hearing voices, had no job, no places to sleep, and was generally unable to function.

* * *

There was a definite thinking disorder with moderately loose associations Early in the admission he had both visual and auditory hallucinations and stated that he

was picking up psychic mind waves and that an interesting word followed him around, the word "heresy" and that it sounded like a witch was saying it. His affect was flattened and possibly depressed.

The diagnosis was "Schizophrenia, paranoid type." The prognosis was "very guarded." It was clear that what Dr. Schneidau had described as a schizophrenic reaction in 1973 had hardened into a diagnosis of paranoid schizophrenia by August of 1975. This hospital stay lasted 40 days.

Several months later on March 3, 1976, John Webb was again admitted to Stamford Hospital. Upon admission he stated, "I feel crazy." He had suicidal ideation, his affect was depressed and flattened, and his thinking was constricted. App. 23. After staying overnight at Stamford Hospital, he was committed to Fairfield Hills Hospital in Newtown, Connecticut.^{1/} Defendant's exhibit B consists of the hospital record and physicians' reports causing John Webb's stay at Fairfield Hills from March 4 through March 20, 1976. The psychiatrists at Fairfield Hills diagnosed John Webb as suffering from chronic undifferentiated schizophrenia and suicidal tendencies were noted. App. 30. The preliminary diagnosis of schizophrenia was made by Yang Joon Kim, M.D., a resident psychiatrist, App. 28, and the final diagnosis of chronic undifferentiated schizophrenia was made by William Kenny, M.D., senior staff psychiatrist. App. 35.

^{1/} The Superintendent of Fairfield Hills was Robert Miller, M.D., the government's medical expert.

The Fairfield Hills admission occurred almost seven months prior to the bank robbery.

Lay Testimony and Bank Surveillance Photo

George Webb, appellant's brother, was called by the government to testify how John had enlisted his aid in hiding the wig and the money obtained in the robbery. It was George Webb who advised the F.B.I. of his brother's whereabouts in Los Angeles on October 21, which information led to John's arrest. George Webb testified on cross-examination that during the year 1976, his brother John was in a constant state of depression. Tr. 66. Further, George Webb described how he and his mother helped John to start an automobile brokerage business, from which John never made one sale. Tr. 67-68. The business had no assets. Tr. 69. George Webb further testified that John had held possibly three or four jobs in the last five years, the most notable being Santa Claus at Bloomingdales in Stamford during a previous Christmas season. Tr. 61-62. John Webb was unable to support himself or to pursue any goal. Tr. 62. On the day following the robbery, John Webb told George that he was going to help poverty-stricken people throughout the whole world by playing the guitar and starting a band. Tr. 60-61. The following Saturday, October 16th, John Webb asked his brother to drive him to Stamford. The trip was marked by John becoming frantic and changing his destination to New York City. According to George, his brother was opening and closing the car door while

the car was travelling at thirty to forty miles per hour.

Tr. 57-58. John kept saying that people were trying to kill him and was ready to jump from the car. Tr. 57. This behavior preceded an interview with the F.B.I. or Norwalk Police, who eventually interviewed John Webb on October 19, 1976, but did not arrest him at that time.

The bank surveillance photos of John Webb in sunglasses and a bizarre wig were offered by the government, and a photocopy is set forth in the appendix at 38. The government presented testimony from various people that John Webb was a quiet and calm individual, although even Detective Russo of the Norwalk Police admitted that John Webb's behavior during an interview on October 19, 1976, six days after the robbery, was both consistent with that of a normal person as well as an abnormal person. Tr. 11.

Medical Testimony: The Defense

Marc Rubenstein, M.D., testified for the defense. In addition to being a licensed psychiatrist with a private practice in New Haven, Dr. Rubenstein is also employed by the Yale Medical School, where he teaches clinical and forensic psychiatry. Tr. 149. Dr. Rubenstein had previously examined John Webb on December 1, 8, and 11 of 1976, less than two months after the robbery. Tr. 150. Dr. Rubenstein also examined the hospital reports set forth in the appendix relating to John Webb's admissions to Stamford and Fairfield Hills Hospitals.

In Dr. Rubenstein's medical opinion, based upon his interviews with Webb and the reports he examined on October 13, 1976, at the time of the crime Webb was suffering from schizophrenia. Tr. 152. He went on to describe schizophrenia as a major psychiatric illness which is characterized by a disturbance not only of thinking but also of feeling. Tr. 153. It is also a disorder characterized by unusually pervasive feelings of despair or fear of death, fear of falling apart. A schizophrenic's feelings are far more "chaotic, disorganized, frightening, and pervasive than people who are not schizophrenic can imagine." Tr. 154. The terror of a nightmare in a normal person is the waking terror of a schizophrenic. Further, John's illness has existed since at least 1973, and probably going back to mid-adolescence. During the December 8 interview, John Webb was actively psychotic and Dr. Rubenstein had serious doubts about his ability to stand trial. Tr. 160. While John had improved to a degree by the 11th of December, Dr. Rubenstein took special note of Webb's extreme depression. This depression was intense and manifested "a sense of falling apart; not being able to go on, wishing to be dead, and the like." Tr. 160. His thought patterns were typical of moderately severe schizophrenia. Tr. 161.

Dr. Rubenstein then testified that at the time of the crime, John Webb's schizophrenic disorder substantially impaired his capacity to think effectively and to control his behavior effectively. Tr. 162. Judging from his interviews with Webb

and his brother, George, as well as examining the hospital records, Dr. Rubenstein felt that John was at least as disturbed at the time of the crime as at the time he examined him. Tr. 162. While his ability to "appreciate" what he was doing was undermined by his schizophrenic disturbance and additionally by his despair, John Webb "knew" that what he was doing was wrongful. He had the intellectual awareness that what he did was against the law. Tr. 163. But because his schizophrenia and his despair and depression had such an overwhelming influence on his thinking, he was unable to reflect on the moral significance of what he was doing. The sense of compulsion experienced by Webb was determined not principally by economic gain but by the sense of emptiness, despair and fear of falling apart; that is, part of his disturbance. Tr. 164.

In answering the Freeman test, Dr. Rubenstein further testified that John Webb's disturbance affects both prongs of the test equally. He was unable either to appreciate the wrongfulness of his conduct or to control his behavior. Tr. 164. Further, because John Webb is unable to hold jobs and stay out of a hospital for long, his is a disabling disease.

Dr. Rubenstein then drew the distinction between John Webb's disturbed thinking and the thinking of a person who has just been down and out all of his life. John Webb suffers from both a schizophrenic thought disorder and depression, which taken together deprive him of the capacity to reflect and come to a rational judgment either to rob a bank or not to rob a bank.

Tr. 173. While there was a superficial level of planning, below the surface Webb felt he had to do this to survive and keep from falling apart. To Webb, it was a war and a fight for survival. Tr. 172.

Of crucial importance to the defense, Dr. Rubenstein explained that "knowing can be only a small part of the whole issue of appreciating what's going on, where the emotional context is, what governs the situation," Tr. 169, and gave several hypothetical examples. At the close of his direct testimony, Dr. Rubenstein reiterated that he believed John Webb, as a result of a mental disease, lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. Tr. 174.

Medical Testimony: The Government's Witness

The government called in rebuttal Dr. Robert Miller, Superintendent of Fairfield Hills Hospital. Dr. Miller examined John Webb only once, on December 29, 1976, for no more than one and one-half hours. Although he took notes during the examination, which was conducted at the behest of the government, he deliberately destroyed his notes even though he knew that he would be coming to court to testify. Tr. 242-243. Although the notes were subpoenaed by the defendant, Dr. Miller testified that counsel would have to go to the garbage dump for memoranda concerning his examination of John Webb. (Dr. Miller's entire report of January 20, 1977,

is set forth in the appendix at 17-18.) Dr. Miller admitted that he had not examined the Stamford Hospital report of the January, 1973, admission and did not know that Webb's prognosis was termed "guarded." Tr. 250. The government's psychiatrist also had not examined the Stamford Hospital report relating to the August, 1975, 45-day hospital stay where the appellant was diagnosed as a paranoid schizophrenic. Tr. 250-251, App. 20-21. He did not even know that John Webb had been suffering from auditory hallucinations in 1975. Finally, Dr. Miller had not examined the Stamford Hospital records with respect to the March 3, 1976, admission, although reference was made to the prior hospitalizations in the March 4, 1976, Fairfield Hills report. Tr. 254.

While Dr. Miller found that John Webb was suffering from schizophrenia, he testified that Webb did not lack substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. Tr. 238. However, on cross-examination it became apparent that Dr. Miller drew no distinction medically or conceptually between "knowing" on the one hand and "appreciating" on the other. App.-Tr. 260. Dr. Miller testified that he had used the term "know" in his report of January 20 because "he was not sufficiently learned in the mazes of the law to make such a differentiation."^{2/} App.-Tr. 261. To

^{2/} Dr. Miller testified that when he writes reports for the state, he uses the term "know." However, the state of Connecticut follows the Freeman rule. Conn. Gen. Stat. §53a-13 (1969).

him it was "simply language." Further, he testified that the distinction between knowing and appreciating, in his opinion, was "pure semantics." App.-Tr. 262.

I really can't honestly say whether
I knew there was a distinction
between 'know' and 'appreciate'
App.-Tr. 263.

However, he agreed when pressed that the emotional processes as well as the intellectual processes play a part in the concept of appreciation. App.-Tr. 263. When asked what terms the law requires him to use when testifying as an expert, Dr. Miller stated that to him "knowing and appreciating" were the same. App.-Tr. 265. Finally, Dr. Miller agreed that a criminal act may be coolly and carefully prepared and yet be the result of a diseased mind. App.-Tr. 265.

At the conclusion of Dr. Miller's testimony, appellant moved to strike the testimony on the ground that the witness could not differentiate between mere knowledge and the appreciation aspect of the legal test, and therefore could not give an expert opinion with respect to whether the defendant lacked substantial capacity to appreciate the wrongfulness of his conduct at the time of the crime. App.-Tr. 267. The motion was denied. App.-Tr. 268.

ARGUMENT

I. THE TRIAL JUDGE ERRED IN REFUSING TO STRIKE
THE GOVERNMENT'S PSYCHIATRIC TESTIMONY AFTER
THE WITNESS ADMITTED THAT HE COULD NOT UNDER-
STAND AND APPLY THIS COURT'S INSANITY TEST.

A. Violation of the Freeman Rule.

In 1966 the Second Circuit took the lead in announcing the adoption of the Model Penal Code rule, §4.01 which provides:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

United States v. Freeman, 357 F.2d 606, 622 (2d Cir. 1966).

Chief Judge Kaufman explained that this court was departing from the M'Naughten Rules because:

They are not in harmony with modern medical science which as we have said, is opposed to any concept which divides the mind into separate compartments--the intellect, the emotions and the will.

Id. at 622.

The choice of the word 'appreciate' rather than 'know' in the first branch of the test also is significant; mere intellectual awareness that conduct is wrongful, when divorced from appreciation or understanding of the moral or legal import of behavior, can have little significance.

Id. at 623. John Webb's entire defense was based upon the

distinction Judge Kaufman described between knowing and appreciating. In addition to testifying that John Webb lacked substantial capacity to conform his conduct to the requirements of the law, Dr. Rubenstein, the defense psychiatrist, stated that while John Webb had the intellectual awareness that what he did was against the law, because of his schizophrenia and his despair and depression, he was unable to reflect on the moral significance of what he was doing. App.-Tr. 163-164. He was therefore unable to appreciate the wrongfulness of his conduct.

What Dr. Miller described as "semantics" was really a development slowly and painstakingly reached over a period of 200 years, since M'Naughten's exculpation from criminal responsibility provoked the reaffirmation of the "right-wrong" test with its roots in uninformed concepts of phrenology and monomania.^{3/} This Court has noted that "M'Naughten's single track emphasis on the cognitive aspect of the personality recognizes no degrees of incapacity." Freeman, 357 F.2d at 618. This Court characterized the M'Naughten test as "grossly unrealistic." Id. Dr. Lawrence Kolb declared that,

answers supplied by a psychiatrist
in regard to questions of rightness
or wrongness of an act or 'knowing'
its nature constitute a professional
perjury.

Remarks, Judicial Conference (2d Cir.), "Insanity as a Defense,"

^{3/} In Freeman, Judge Kaufman sets forth an extensive analysis of the origins, development, and final rejection of the M'Naughten rule. 357 F.2d at 615-20.

37 F.R.D. 365, 387 (1964), quoted in Freeman, 357 F.2d at 619. Dr. Miller, the government's expert, testified that he perceived no difference between knowing and appreciating. App.-Tr. 260. He characterized any possible difference as "semantic." App.-Tr. 260-261. The terms "pretty much interchange." App.-Tr. 261. When asked about the legal and medical literature with respect to the change from the right-wrong M'Naughten test to the Freeman rule, Dr. Miller testified that to him the verbiage in the legal journals was "philosophical dissertations" which have "little value." It is only semantics. App.-Tr. 261-262. When he wrote his report, he testified:

I really can't honestly say whether I knew that there was a difference between 'know' and 'appreciate' in terms of specific words, since to me, regardless of what it might be for someone else, I use them interchangeably.

App.-Tr. 263. Dr. Miller then conceded that the concept of "know" only takes into account the cognitive quality. App.-Tr. 263. "To me" know and appreciate were the same. App.-Tr. 265.

The district court's denial of appellant's motion to strike left the jury with Dr. Miller's expert opinion testimony which was not based upon the governing legal standard of this Circuit under Freeman. The failure to strike this testimony deprived the appellant of a fair determination of the validity of his defense and violated the Freeman rule.

B. The District Court's Refusal to Strike Violated Rules 702 and 403 of the Federal Rules of Evidence.

Dr. Miller was testifying as the government's expert. His failure to apply the proper test to the question of John Webb's mental responsibility and specifically to his capacity to appreciate the wrongfulness of his conduct constituted a violation of Fed. R. Evid. 702, a condition precedent of which is that the testimony will assist the trier of fact.^{4/} The testimony also confused and misled the jury in violation of Rule 403.^{5/} The advisory committee's note to Rule 702 states that opinions which are "unhelpful" should be excluded. Cf. United States v. Robinson, 544 F.2d 110, 112-13 (2d Cir. 1976)(helpfulness under Rule 701); see 7 Wigmore §1918. His testimony, adamantly expressed in terms purposely rejected in Freeman, was not only of no help to the jury but also obviously had the effect of misleading them.

^{4/} Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

^{5/} Rule 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

If there was some relevance to Dr. Miller's testimony, its misleading and confusing quality and basis required it to be stricken under Rule 403. The prejudice to the defense which resulted from Dr. Miller's testimony substantially outweighed its probative value. While there is discretion in the district court to balance probative value and prejudice, such discretion is "far from unlimited[,] and . . . appellate courts have a vital role to play in overseeing the exercise of this discretion." United States v. Robinson, 544 F.2d 611, 616 n.6 (2d Cir. 1976)(petition for rehearing granted). However, if Dr. Miller's testimony violated Freeman, it was not only irrelevant but also incompetent and should have been stricken absolutely.

The Miller testimony violated the Freeman rule and thereby deprived appellant of a fair determination of his responsibility at the time of the offense. The conviction should be reversed.

II. THE GOVERNMENT'S EVIDENCE OF MENTAL RESPONSIBILITY WAS INSUFFICIENT.

The appellant moved for judgment of acquittal at the close of the government's case, after all the evidence and notwithstanding the verdict. These motions were summarily denied by Judge Zampano. It is the law of this Circuit that the government must prove mental responsibility beyond a reasonable doubt.^{6/} United States v. Hendrix, 542 F.2d 879, 880 (2d Cir. 1976); Davis v. United States, 160 U.S. 469, 485 (1895). Realizing that the evidence must be viewed in the light most favorable to the government, United States v. Hawley, Docket No. 76-1469 (2d Cir., April 27, 1977), slip op. 3239, we submit that the misleading, confusing and incompetent nature of the Miller testimony discussed in Part I, supra, rendered the government's rebuttal evidence insufficient. The government's burden was to prove beyond a reasonable doubt that Webb did not lack substantial capacity by reason of his schizophrenia either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law, United States v. Freeman, supra. Because the government's expert clearly did not understand the crucial distinction between mere cognition and appreciation, the basis for his opinion was contrary to law and insufficient to support the government's burden of proof.

^{6/} There is no question that the issue of John Webb's mental responsibility was properly raised by the defendant.

Further, Dr. Miller lacked an adequate factual basis for his opinion. While Dr. Rubenstein conducted three interviews of John Webb on December 1, 8, and 11, 1976, Dr. Miller interviewed John Webb only once, on December 29. While Dr. Rubenstein had examined the Stamford Hospital reports of January, 1973, August, 1975, and March, 1976, and the Fairfield Hills Hospital report of March, 1976, Dr. Miller had examined only his own institution's hospital report of March, 1976. While Dr. Rubenstein had made and kept copious and detailed notes, Dr. Miller had deliberately destroyed his own. Further, his report of January 20, 1977, was directed to an incorrect legal test. App. p. 17.

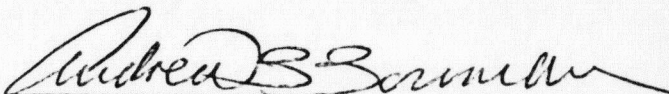
Having so meticulously developed the Freeman rule of law by which mental responsibility can be more fairly judged, the affirmance of this conviction would surely be a return to M'Naughten's tunnel-vision focus on cognition. Under the Freeman rule, this conviction must be reversed because there was in insufficiency of proper evidence to support it.

CONCLUSION

The government failed to carry its burden of proving mental responsibility under the appropriate test. The conviction should therefore be reversed for dismissal of the indictment. Alternatively, the case should be reversed and remanded because the district court erroneously refused to strike the inadmissible evidence of the government's psychiatrist.

Respectfully submitted,

Dated: May 6, 1977



Andrew B. Bowman
Federal Public Defender
770 Chapel Street
New Haven, Connecticut 06510
(FTS) 8-643-8148
Attorney for Appellant

CERTIFICATION

I hereby certify that two copies of the foregoing Brief for Appellant have been mailed to Michael Hartmere, Esq., Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut, 06508, this 6th day of May, 1977.

